IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY

WEDNESDAY, THE 14TH MARCH 2007 / 23RD PHALGUNA 1928

CRL.A.No. 880 of 1999()

CRA.43/1996 of SESSIONS COURT, PATHANAMTHITTA
SC.23/1995 of ASSISTANT SESSIONS COURT, THIRUVALLA
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APPELLANT:

RAJAN,S/O.KUNJAPPAN,
KALAMBUKATTIL KALATHIL HOUSE,
NJALBHAGOM MURI,KAVIYOOR VILLAGE,
THIRUVALLA TALUK.

BY ADV. SRI.MVS.NAMBOOTHIRY
SRI.MVS.NAMBOOTHIRY

RESPONDENT:

THE STATE OF KERALA, REP. BY THE
PUBLIC PROSECUTOR, PATHANAMTHITTA.

BY PUBLIC PROSECUTOR SRI.K.C.SANTHOSH KUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 14/03/2007, ALONG WITH CR.R.C NO.9 OF 1998, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY, J.

Criminal Appeal.No.880 OF 1999 ()

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Criminal.R.C.No.9 OF 1998

Dated this the 14th day of March, 2007

JUDGMENT

Crl.R.C.No.9/1998 is a suo motu revision. The accused was charge sheeted by the police for the offences punishable under Section 366 A and 376 of the Indian Penal Code. However, 366 A of I.P.C. was deleted and charge sheet was issued by the trial court under Section 366 instead of Section 366 A. The case of the prosecution was that PW2 prosecutrix was only aged 16 and in Ext.P10 SSLC Book her age is below 16 on the date of incident. This Court in calender revision noticed that trial court need not always adopt the police charge sheet (final report) and charges under Section 366 and 373 by the trial court excluded Section 366 A needs no interference. However it was noticed that the accused was acquitted for the offences punishable under Section 376 stating that the sexual intercourse was made with consent. On the ground that girl was below 16, consent cannot be taken as a defense for the

charge under Section 376, suo motu revision was taken and it is numbered as Crl.R.C.9/1998. Against the conviction and sentence the accused filed an appeal as Crl.A.No.43/1996 before the Sessions Court, Pathanamthitta. Since this suo motu revision petition was already taken the above criminal appeal was also called before this Court. It was numbered as Crl.A.880/1999.

2. On going through the judgment of the Assistant Sessions Judge, we are of the view that the Assistant Sessions Judge did not consider the question whether accused was below the age of 16 in view of Ext.P10 SSLC book and the question of inability of consent while acquitting the accused for the offences punishable under Section 376. In the above circumstances, the matter has to go back to the Assistant Sessions Judge for further consideration as in a revision petition filed against acquittal matter can only be remanded. In Appeal contention of the accused is that charges levelled against him were not proved. In any event trial court had to enter fresh findings in view of the order in criminal revision. In the above

circumstances, Crl.R.C.No.9/1998 and Crl.A.No.880/1999 are allowed as the accused is free to file appeal after final decision of the Assistant Session Judge after remand. Assistant Sessions Court shall re appreciate the evidence and fresh findings shall be entered into on the basis of the evidence already on record. Since no procedural violation is alleged, no further evidence can be adduced. Hence his conviction under Section 366 is also set aside along with acquittal for the offences punishable under Section 376. Trial court shall decide the question of conviction and sentence afresh after giving opportunity for both sides for arguments untrammelled by the earlier findings. We are not expressing any opinion on the merits of the case. Both Crl.R.C. and Crl.Appeal are allowed by way of remand. Accused may appear before the trial court on 9.4.2007. Registry is directed to send out the records to Assistant Sessions Judge, Pathanamthitta as expeditiously as possible.

J.B.KOSHY, JUDGE

prp

J.B.KOSHY

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&
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JUDGMENT

14th March, 2007